

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

BRUCE R. ROBERTS,)	CIVIL ACTION NO. 5:02CV00093
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
BARBARA M. FORRESTER,)	
Executrix of the Estate of)	
J. Albert Forrester, Decedent,)	
and)	
FORRESTER FARM EQUIPMENT, LTD.,)	
)	
Defendants,)	
)	
v.)	
)	
LORI ANN FOX,)	
)	
Third-Party Defendant.)	JUDGE JAMES H. MICHAEL, JR.

The plaintiff in this action seeks damages for the alleged negligence of the defendants and punitive damages for the alleged gross negligence of the same. The defendants have filed a counterclaim alleging the contributory negligence of a third party and have filed a motions for summary judgment. After a thorough examination of each party's objections, the supporting memoranda, the applicable law, and the report and recommendation, this court adopts the recommendations of the magistrate judge with the exception of his conclusion regarding the potential for punitive damages.

I. FACTS

This action is virtually indistinguishable from its companion case, *Fox v. Forrester*, 2003 WL 22228305 (W.D. Va. Sept. 25, 2003). Although the pertinent details are reviewed here, a more exhaustive treatment is contained in the magistrate judge's discussion.

Both cases arose from a traffic accident in Bentonville, Virginia occurring on August 23, 2000. As J. Albert Forrester entered the town of Bentonville at approximately 7:20 p.m. that day driving a truck with a trailer in tow, he crossed the solid double yellow line of a two-lane highway to pass at least three vehicles. The defendant, the executrix of Forrester's estate, has admitted that during this maneuver the decedent was speeding, and eyewitness testimony has indicated that his speed exceeded sixty, if not seventy, miles an hour in the no-passing zone.

At the same time, Lori Ann Fox approached the intersection of State Route 613 with Route 340, the route which the defendant was traveling. Ms. Fox, oblivious to the danger, then turned into the path of Mr. Forrester, whose truck struck her van twenty-five feet from the intersection. The plaintiff was injured by the episode, and Mr. Forrester died as a result of his injuries shortly thereafter.

The sole factual distinction between the two cases is that Mr. Roberts, the plaintiff in this case, was the passenger of the car Ms. Fox was driving when it was struck by Mr. Forrester.

II. PROCEDURAL POSTURE

Mr. Roberts has sued both the representative of Mr. Forrester's estate and the company of which Mr. Forrester was president, Forrester Farm Equipment ("FFE"). The defendants, in turn, have filed a third-party action alleging contributory negligence on the part of Ms. Fox, the driver.

On September 9, 2003, the plaintiff filed a motion for summary judgment. On September 10, 2003, Defendant Forrester filed a motion for partial summary judgment on the issue of punitive damages and a motion for summary judgment claiming that the plaintiff's claim was barred by Pennsylvania probate law. On the same day, Defendant FFE filed a motion for summary judgment on the ground that FFE was not responsible for Mr. Forrester's conduct. Finally, Third-Party Defendant Fox also has filed a motion for summary judgment on the issue of contributory negligence.

In his report filed October 29, 2003 (“Report and Recommendation”), the magistrate judge recommended that the plaintiff’s motion for summary judgment be granted in part and denied in part.¹ He also recommended that Defendant Forrester’s motion for partial summary judgment on the issue of punitive damages be granted but that her motion for summary judgment concerning the Pennsylvania probate statute be denied. As to Defendant FFE’s motion for summary judgment, he recommended that it be denied. Finally, the magistrate judge recommended that the motion for summary judgment filed by the third-party defendant be granted.

Both defendants have filed timely objections to the Report and Recommendation. Contending that the holding of *Fox v. Forrester* should not direct the outcome of this case, Defendant Forrester objects to the finding that the Pennsylvania probate statute does not operate to bar the plaintiff’s claim. Defendant FFE objects to the magistrate judge’s conclusion that its motion for summary judgment should be denied on the issue of respondeat superior and the issue of punitive damages. Both defendants object to the recommendation that the contributory negligence claim against Ms. Fox be dismissed.

III. STANDARD OF REVIEW

According to § 636(b)(1)(C), this court “shall make a de novo determination of those portions of the report . . . to which the objection is made.” 28 U.S.C. § 636(b)(1)(C) (2000). A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c);

¹ The magistrate judge recommended that the plaintiff’s motion for summary judgment be granted with respect to Defendant Forrester’s liability but denied with respect to FFE’s liability. No objection having been made, the court will accept this recommendation. It does so because, as discussed *infra*, it is not clear that FFE will have to answer for Mr. Forrester’s negligence; however, the underlying negligence of Mr. Forrester is not subject to further litigation.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “[S]ummary judgment . . . is mandated where the facts and the law will reasonably support only one conclusion.” *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the nonmoving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

IV. DISCUSSION

A. Pennsylvania Probate Statute

Based on its opinion in *Fox v. Forrester*, the court will overrule the Defendant Forrester’s objections to the magistrate judge’s conclusions regarding the Pennsylvania probate statute. In *Fox v. Forrester*, the court concluded that, “[g]iven the remedial nature of the Pennsylvania nonclaim statute and the distinction between probate matters and independent actions supported by Virginia law, . . . Virginia conflicts law would not give extraterritorial effect to the Pennsylvania statute in [that] case.” *Id.* Counsel for defendant takes great pain to shield this case from the preclusive effects of this court’s prior judgment in *Fox*. However, he does little to distinguish the two (an impossible task in terms of the probate issue), to identify the error in this court’s prior thorough treatment of the issue, or to provide new authority supporting his position. Even assuming that the court is not bound by its prior judgment as a matter of law, the defendant has not offered any ground to deviate from its reasoning in *Fox v. Forrester*. The defendant’s objection is therefore overruled.

B. Contributory Negligence Claim

The court employs similar reasoning to dispatch with both defendants' objections to the findings concerning the third-party contributory negligence claim. A similar claim also was adjudicated in *Fox v. Forrester*. There, the defendant initially raised the issue of the plaintiff's negligence in the form of a defense and in the form of a counterclaim. The defendant eventually withdrew the counterclaim, and this court dispensed with the remaining defense after concluding that no reasonable jury could find for the defendant. Again, neither defendant identifies a substantive reason to depart from the court's prior decision. The reasoning there applies here to defeat the defendants' objections concerning the issue of contributory negligence.

C. Liability of Forrester Farm Equipment

The court now turns to the last objection at issue. FFE objects to the magistrate judge's recommendation to deny its motion for summary judgment on the issues of respondeat superior and of punitive damages. According to FFE:

The evidence is uncontroverted that the decedent, Albert Jay Forrester, driving a tractor owned by Amos Martin and pulling a trailer carrying a tractor owned by Amos Martin on the date of the subject accident, was not acting in the scope of his employment with Forrester Farm Equipment on the date of the subject accident, and was simply on a personal trip to go to a tractor pull to watch his son compete. Plaintiff submitted no evidence to this Court before to place a material issue of fact in dispute as to the issue of respondeat superior. Furthermore, with respect to the issue of punitive damages, Plaintiff presented no evidence to this Court that Forrester Farm Equipment ratified the actions of Albert Jay Forrester on the date of the subject accident.

(Def. FFE Obj. to Oct. 29, 2003 Report and Recommendation ¶ 1.) For the reasons that follow, the court will overrule FFE's objection to the magistrate judge's conclusion concerning the doctrine of respondeat superior but will sustain its objection concerning the availability of punitive damages.

A. Respondeat Superior

Neither Defendant FFE nor Plaintiff Roberts appear to dispute the legal standard articulated by the magistrate judge. “The doctrine of respondeat superior applies only where the relationship shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose is that of master and servant or principal and agent” 2B MICHIE’S JUR. *Automobiles* § 49 (2002). As Mr. Forrester was president of the company, there can be little doubt that a principal-agent relationship existed. The more difficult question concerns whether Mr. Forrester’s actions were conducted within the scope of his employment. An act is within the scope of employment if it is “fairly and naturally incident to the business” and if it is “done while the servant was engaged upon the master’s business with a view to further the master’s interests.” *Id.* § 51. “The authorities are in accord that the owner of a car is not responsible where his agent or employee uses the car, when off duty, for his own pleasure and not in the business of the employer.” *Id.* “The question of whether a vehicle owner is liable for the acts of his agent or servant is ordinarily one for the jury.” *Id.*

While there is some evidence that Mr. Forrester embarked on his trip to Luray as a matter of personal fancy, there is also some evidence that the trip to the show that day and others like it were undertaken with some view toward FFE’s business interests. To review a few of these pertinent facts, the court observes that, at the time of the accident, FFE was a dealership selling tractors and other farm equipment. It sponsored tractor pulling teams, which frequently competed in tractor pulls. Employees of the company competed in these events, and Mr. Forrester himself utilized tractor pulls as an advertising venue and derived business from the shows. It is entirely possible that the other facts raised by FFE support its position, but these facts raise a question as to whether Mr. Forrester was operating within the

scope of his employment traveling to the pull on the day of the accident and whether trip was fairly incident to the business of FFE. The court therefore agrees with the conclusion of the magistrate judge that the issue is one to be reserved for the jury.

B. Punitive Damages

The court now turns to the issue of FFE's exposure to punitive damages. Virginia law is quite clear that a principal may be held liable for punitive damages for the acts of an agent only "where the act is participated in, or authorized or ratified by, the principal." 5C MICHIE'S JUR. *Damages* § 72 (1998); *Tri-State Coach Corp. v. Walsh*, 49 S.E.2d 363, 368 (Va. 1948) (holding employer liable for tortious act of employee under theory of respondeat superior, but refraining to find basis for punitive damages without express authorization or ratification). There has been no evidence or claim that the tort was expressly authorized by FFE, nor that FFE somehow participated in the commission of the tort.

Instead, the plaintiff offers the theory that punitive damages are available because, by virtue of his position within a close corporation, Mr. Forrester was capable of ratifying his own tortious conduct the day of the accident on behalf of FFE. The court is disinclined to accept the plaintiff's characterization of Mr. Forrester as simultaneous principal and agent (or as simultaneous master and servant). The question at hand concerns whether FFE, as a principal, can be held liable for the acts of Mr. Forrester, its officer and hence its agent. To conflate the fictitious entity and the real person ignores basic principles of agency law and the structure of the legal relationship between Mr. Forrester and his company. Beyond the theory that Mr. Forrester, at the time of the accident, became FFE by a mere change in hats, there is little suggestion by the plaintiff that FFE ratified Mr. Forrester's tortious conduct after the fact. The court therefore will sustain FFE's objection to the finding of the magistrate judge with respect to the issue of punitive damages.

The only two questions remaining to be resolved at trial are the issue of damages and the issue of FFE's responsibility for Mr. Forrester's conduct. The question of contributory negligence, having been resolved in favor of the third-party defendant, has no bearing on either issue. The court also clarifies that even if a jury were to find for the plaintiff on the issue of respondeat superior, that finding would not disturb the court's conclusion concerning the issue of punitive damages. Even if Mr. Forrester was acting in the course of his employment that day, there is no evidence that FFE ratified his tortious conduct.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
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BRUCE R. ROBERTS,)	CIVIL ACTION NO. 5:02CV00093
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BARBARA M. FORRESTER,)	
Executrix of the Estate of)	
J. Albert Forrester, Decedent,)	
and)	
FORRESTER FARM EQUIPMENT, LTD.,)	
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Defendants,)	
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v.)	
)	
LORI ANN FOX,)	
)	
Third-Party Defendant.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. Defendant Forrester's objections to the Report and Recommendation, filed November 12, 2003, shall be, and they hereby are, **OVERRULED**.
2. Defendant Farm Forrester Equipment's first objection to the Report and Recommendation, filed November 10, 2003, directed to the issue of respondeat superior, shall be, and it hereby is, **OVERRULED**; Defendant FFE's second objection, directed to the issue of punitive damages, shall be, and it hereby is **SUSTAINED**; and Defendant FFE's third objection, directed to the issue of contributory negligence, shall be, and it hereby is **OVERRULED**.

3. The magistrate judge's Report and Recommendation, filed October 29, 2003, shall be, and it hereby is, ADOPTED IN PART AND MODIFIED IN PART.

4. The plaintiff's Motion for Summary Judgment, filed September 9, 2003, be GRANTED with respect to Defendant Forrester but DENIED with respect to Defendant Farm Forrester Equipment.

5. Defendant Forrester's Motion for Partial Summary Judgment on the Issue of Punitive Damages, filed September 10, 2003, shall be, and it hereby is, GRANTED; however, Defendant Forrester's Motion for Summary Judgment, also filed September 10, 2003, shall be, and it hereby is, DENIED.

6. Defendant FFE's Motion for Summary Judgment, filed September 10, 2003, shall be, and it hereby is, DENIED with respect to FFE's liability, but GRANTED with respect to the issue of punitive damages.

7. Third-Party Defendant Fox's Motion for Summary Judgment, filed September 10, 2003, shall be, and it hereby is GRANTED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

Senior United States District Judge

Date